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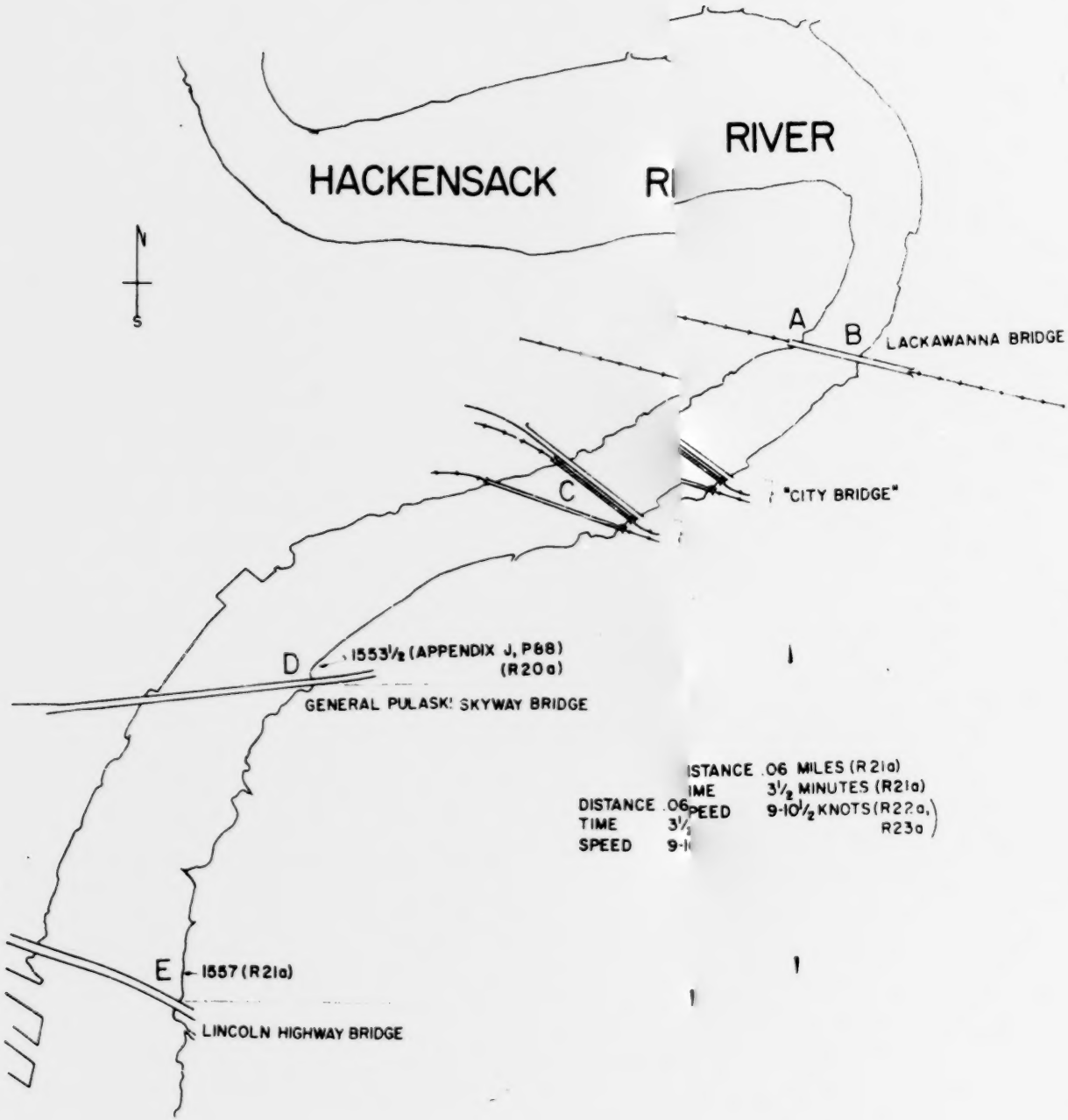
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBULUS,

Petitioner,

against

CHARLES PESCHKEN,

Respondent,

and

CANOLIUS V. HINES and FRED W. BENTS

OPPOSITION TO MOTIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEFS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, David D. Furman, Attorney General of New Jersey, counsel for respondent, Charles Peschken, respectfully advises this Honorable Court of the reasons for objecting to the filing of briefs by Seaway Excursion Lines, Inc., and American Waterways Operators, Inc., as *amicus curiae*, and the reasons for withholding respondent's consent to the filing of such briefs.

Statement

Seaway Excursion Lines, Inc. and the American Waterways Operators, Inc., have each sought our consent to their filing briefs as *amicus curiae* in support of the petition for a writ of certiorari. Our consent was promptly refused. Their respective motions and proposed *amicus curiae* briefs followed. In essence both moving parties seek to advance their own special interests and to turn a specific trial involving one accident into a quasi-legislative investigation by the Supreme Court of other accidents and other conditions which may or may not exist at other times and places. No foundation in fact exists in the record of the case below for their contentions.

Seaway Excursion Lines, Inc. states that it has an appeal pending in the state courts of Ohio in a case that is apparently unreported. Although the facts in that case are not set forth in its brief here, it is assumed that Seaway Excursion Lines, Inc. operated a vessel that collided with a bridge somewhere in the United States. Its motion and brief here tell this court nothing about that case and nothing about the true facts of record in the case at hand. On the contrary, Seaway Excursion Lines, Inc. is under the mistaken impression that our case was tried on the theory that (a) warning signals were always given by the bridge tender, respondent Peschken, regardless of the possibility of delay in sufficiently opening the bridge to permit passage of the vessel and (b) that the master and pilot of the vessel, the Lembulus, were therefore justified in ignoring the warning signals from the bridge. The case was not tried on this theory and the facts of record do not support the assertion of this theory on appeal.

We do not know what conditions prevailed in the Ohio case involving Seaway Excursion Lines, Inc., nor whether Seaway Excursion Lines, Inc. has tried its case on the

theory now sought to be advanced. Similarly, the motion and brief of the American Waterways Operators, Inc. is based on a misconception of the facts of the Lembulus accident and of the theory on which the case was tried below. The record in the trial of this Lembulus accident case does not support either of the two bases for argument now urged upon this court.

In the first place, the Shell Petroleum Co. Ltd., owner of the Lembulus, did not contend that the two-blast warning signal was given by the bridge tender and could be justifiably ignored by the vessel. Shell contended that *no* warning signals were given by the bridge.[1] Moreover, in our brief in opposition to the petition, at page 8, we quoted from Shell's brief before the Court of Appeals in which Shell contended that "we doubt, however, that any blasts were given at all" from the bridge.

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[1] Shell contended that the bridge tender did not give the two-blast warning signal, despite the fact that Shell produced no witnesses to deny that such warning signals were given. Shell produced only two witnesses. Captain Hawkins, Master of the Lembulus, testified that the vessel signalled the bridge of its approach at about 1553, when the vessel was "just about to pass under" the Pulaski Skyway and that in response to the three-blast signal from the vessel, "the bridge answered our signal and commenced lifting almost immediately" (R5a and R6a). Many witnesses testified that the answering signal from the bridge was a two-blast signal and this testimony was not contradicted by any of Shell's witnesses. Nevertheless, Shell contended at the trial level and before the Court of Appeals that the bridge failed to give the two-blast warning signal. This contention was based upon a self-serving report of the accident made by Captain Hawkins to Shell Tankers, Ltd. in London, which contained the ambiguous statement that, "They in turn answered with their signal indicating that they were in the process of lifting the bridge and, it was observed that they were in fact doing so" (R85a). However, the trial court rejected Shell's contention and found as a fact that the signal from the vessel "was acknowledged by the Highway bridge by 2 blasts of its horn (the prescribed warning of delay in opening of the draw) * * *" (R30a).

In the second place, there was no proof in the case below that when Captain Hawkins heard the two-blast signal he felt justified in disregarding it as a warning signal. The voyage on December 20, 1957 was the first trip Captain Hawkins made on the Hackensack River (R11a). He did not testify that he knew anything about the so-called practices of bridge tenders on the Hackensack River. In fact, Shell contended below that Captain Hawkins "shouldn't be expected to know" whether the bridge tender gave the two-blast or a three-blast signal because he was a "deep sea Master who cannot be expected to know local regulations."

Nor was any testimony given by the pilot of the Lembulus. Captain J. A. Bassett was not alive at the time of the trial. Nor were there any depositions of Captain Bassett to show whether or not he misinterpreted the warning signals from the bridge. Nor was there any evidence introduced to show the so-called prevailing practices on the Hackensack River, or on the East River, or the Chicago River, or on any other navigable waterway in the United States.

Thus, there are no facts in the record of this case to support the contentions now being made before this court.[2]

We do not believe that this court is the forum for a legislative inquiry into facts that do not appear of record in the case. If bridge tenders are not fairly complying with warning signal regulations, and if ship-bridge collisions are occurring because of this fact (conclusions which do not appear of record in this case) it may be appropriate for the Secretary of the Army to promulgate applicable regula-

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[2] This is as if an intersection automobile accident occurred in New Jersey and a car owner involved in an accident in Ohio were to come before this court and request that the New Jersey accident case be reviewed because someone in Ohio contends to have a prescriptive right to go through a stop-light with impunity.

tions or for a legislative committee to investigate the matter and to make appropriate legislative or regulatory recommendations. This course is not an appropriate one for the United States Supreme Court. Nor it is fair that new facts, not of record, now be alleged as a basis for urging this court to take an appeal.

The case below was tried on the assumption that the two-blast warning signal from the bridge was the appropriate warning signal. In fact, there was a stipulation by counsel with the court on this very point. In our brief in opposition to the petition for a writ of certiorari we quoted in a footnote, at pages 11 and 12, the stipulation to the effect that the rule concerning the use of two blasts as a warning signal (in case of difficulty or delay in getting the bridge open) was "the rule in effect on the date of this collision." Shell's counsel, F. E. P. McCarter, Esq., stated, "I don't think there is any question about that." Counsel for petitioner, Robert M. Julian, Esq., also participated in the trial, and did not take exception to this stipulation.

The trial court held that although the two-blast signal was given it was, in effect, countermanded by the commencement of the opening of the bridge. This rule of law has never been announced in any case which we have found or which has been called to our attention by opposing counsel, on the trial court or the appellate court levels. This novel theory would create complete chaos and uncertainty in the exchange of warning signals and would in effect unjustifiably repeal the regulations of the Secretary of the Army. This novel theory, invented by the trial court, was rejected by the Court of Appeals. This novel theory would deny a bridge tender the ability to give any warning signal at all. Obviously, if a bridge tender fears that there may be a delay in opening the bridge or that because of mechanical or electrical difficulties the bridge may not be promptly or fully opened to permit clearance of the vessel, he is

obliged to give a two-blast warning signal. But, under this novel theory of the District Court, he could not commence opening the bridge, for to do so would destroy the warning signal. This could result in the bow of the vessel actually colliding with the bridge and, possibly, sinking on the spot. Obviously, where there is the possibility of delay or difficulty in sufficiently opening the bridge to permit clearance, a bridge tender must be permitted to give the two-blast warning signal, and he must also be permitted to commence opening the bridge as best as possible under the circumstances. This, then, was the issue of law in the District Court and in the Court of Appeals.

The issues of fact in the District Court in this singular case were:

(a) Did the bridge give the two-blast warning signal?

(b) Did the bridge span stop during its ascent?

(c) Was the vessel going at an excessive speed?

(d) Did the Lembulus go through the Lackawanna Bridge stern-first or bow-first?

(e) Was Captain Hawkins unworthy of belief as to accuracy or veracity and did the conflicts and alterations in the records of the Lembulus discredit Shell's case?

There was no issue of fact as to what signals were usually given by Mr. Peschken or other bridge tenders on other occasions. As a matter of fact, Mr. McCarter, counsel for The Shell Petroleum Co. Ltd., objected to testimony by the bridge tender, Peschken, as to "the number of blasts that you usually give." The court sustained his objection saying, "We are interested in what was given this time" (R54a).

The testimony of Mr. Peschken on this point, quoted in part in the Appendix to our Brief in Opposition, R53a and 54a, is as follows:

"Q. I show you a copy of the rules that are issued by the Secretary of War, which state it was approved July 8, 1933, by George H. Dern. Can you identify that? A. I have seen that before.

"Q. You have seen these before. Do you know the rule about the sounding of the whistle as to the opening of a drawbridge? A. I do.

"Q. What is the number of blasts that you give on the whistle in the ordinary run to open a bridge, according to the rules? A. Well, the rules, I don't think, is listed in there.

"The Court: I didn't hear you.

"The Witness: I beg your pardon?

"The Court: I didn't hear you. I have to hear you because I have to decide this case. What did you say?

"The Witness: The rules today, we give two blasts.

"The Court: That is by way of acknowledgment of the signal given by the vessel?

"The Witness: The signal, and letting the vessel know—

"The Court: That it is okay to come ahead?

"The Witness: No, the bridge is not ready for opening immediately.

"The Court: Oh.

"The Witness: Due to traffic conditions.

"Q. I will read this part of the rule 4 on the reverse side of the page.

'In case of delay in opening the draw, as is provided for in these regulations, or as may be necessary by

accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge.'

Is that right? A. That's right, sir.

"Q. As the operator of the bridge, what is the number of blasts that you usually give?

"Mr. McCarter: I object to that; for what purpose, when, and so on.

"The Court: Yes.

"Mr. D'Auria: At any time, sir.

"Mr. McCarter: Under what circumstances?

"The Court: *We are interested in what was given this time. Objection sustained; go ahead.*" (Emphasis added.)

The specific reason for giving the two-blast signal at the time in question was testified to by Mr. Peschken as follows (R55a):

"Q. As soon as they saw the vessel, the Lembulus, what did you do? (280) A. I advised the two attendants to go down, get ready to close the gates. As soon as they got downstairs, I changed the traffic lights, pushed the button to change the traffic lights. When I seen the red light up, I gave them the signal to close the gates. Immediately after, I had the lights on the board that showed that the gates were all closed. We started to open the bridge. I blew the two blasts for the ship.

"The Court: Let me interrupt, if I may. You say you blew two blasts from the bridge as a signal to the ship, is that right?

"The Witness: That's right.

"The Court: And what purpose were those two blasts blown for?

"The Witness: Possibility of a delay.
"The Court: Possibility of delay. Go ahead."

Shell asserts on this appeal that Mr. Peschken violated the State Highway Department rules (Appendix F) in the operation of the bridge. Rule 2 of the State Highway Department provides that: "If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts is to be repeated at intervals *until the draw can be moved.*" (Emphasis added; P55a.) This rule was cited in the opinion of the District Court (P28a). But this rule did not apply for several reasons. The draw *could be moved*, and, therefore, the rule did not require the warning signal to be repeated at intervals. Moreover, the trial court held in its letter opinion (Appendix B, P44a) that the Highway Department regulations did not apply and that, "There is no evidence that the master of the vessel or her pilot had knowledge either of the defect or of the regulations adopted by the Highway Department with regard to the giving of warning signals, and therefore the vessel was entitled to rely upon the regulations promulgated by the Secretary of the Army which I have quoted in my filed opinion."

Thus, there is no merit to the contention made by petitioner and the moving parties. The bridge span could be moved. However, there was the possibility of delay due to mechanical or electrical defects. As such, the bridge tender gave the proper warning signal to the vessel. There is no proof in the record that the master or pilot of the vessel did not feel bound by federal regulations. The case, in fact, was tried on the principle that those regulations were controlling. Therefore, the vessel was guilty of violating the controlling regulations and was negligent in not heeding the warning signals. The holding of the Court of Appeals is clearly correct and conforms to long established principles of law.

> In any case, the decision below in favor of respondent, Peschken, can be sustained on other grounds than the holding as a matter of law made by the Court of Appeals. Thus, we contend that this court ought not grant certiorari. The District Court found as a fact that the vessel was going at full harbor speed ahead (9 knots) for six minutes from 1547½ to 1553⅓ (P42a). The trial court found that the average speed of the vessel for the distance of 1.1 nautical miles before reaching the Highway bridge was 7.33 knots (P32a). The trial court further found that, "The Captain of the Lembulus, however, admitted that her average speed between the Skyway and the Lincoln Highway bridge was 9 knots" (P32a).

bridge was 9 knots" (P32a).

We maintain that average speeds of 7.33 knots or 9 knots for the short distance before reaching the Highway bridge are clearly excessive speeds. That these speeds were excessive is obvious. Respondent's expert testified that the maximum safe speed for a vessel travelling between Koppers Wharf and the Lincoln Highway bridge would be 3½ to 4 knots (P33a). Captain Hawkins himself testified that the Lembulus maintains steerage-way under the conditions that existed at a speed of 3.42 knots (R22a). The only evidence fixing the time and positions of the vessel between the point just north of the Pulaski Skyway, at 1553½, and the Lincoln Highway bridge, at 1557, came from Captain Hawkins *on his direct testimony.* (See the sketch included at page i, above.) A vessel travelling the distance between those two points, approximately .6 nautical miles, in 3½ minutes, as a matter of mathematical truth must be travelling at over 9 knots. This is almost the speed that the Lembulus could attain in the open ocean, as admitted by Captain Hawkins. His testimony on this point is as follows (R23a, 24a):

"*Recross examination by Mr. D'Auria*:

> "Q. So we can safely say in 3½ minutes that the Lembulus was doing north of the Skyway to the Lin-

coln Highway between nine and 10.20 knots? A. Yes.

"Q. Which is almost the speed you would do in the open ocean, isn't that right? A. Yes.

"Mr. D'Auria: No further questions."

On the basis of this record we cannot understand how the American Waterways Operators, Inc. can come to the support of the Lembulus in this case. We understand that the Moran Towing Company, whose tugs and pilot were responsible for bringing the Lembulus down the Hackensack River, has one or more corporations that are members of the trade association, the American Waterways Operators, Inc. We understand also that perhaps the owner of the Lembulus, The Shell Petroleum Co. Ltd., has an affiliate or subsidiary company that may be a member of the same trade association. But we respectfully suggest that the monetary loss through the damage to two masts of the Lembulus was not so great in the case at hand to justify the extreme effort which is being made to obtain a money judgment against the bridge tender, Peschken.[3]

We respectfully submit that these extreme measures, taken to suggest that this case is of national importance, are entirely unwarranted. Important or not, the holding of the Court of Appeals below merely continues sound law on this subject. The holding is that where a vessel disregards a two-blast warning signal given by a bridge tender because of electrical trouble on the bridge, the vessel cannot

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[3] This effort includes Appendix K of petitioner's Reply Brief, a reprint of a New York Times obituary about Captain John A. Bassett. This was not in evidence in the case below. Why is it introduced without permission at this final, last gasp, Reply Brief stage? Should we now be allowed to challenge the suggested expert qualifications of Captain Bassett, by showing the charges recommended against him for ramming another vessel before his death and for the failure to give proper warning signals on another occasion?

recover for damages inflicted when it runs into a bridge-span that has not yet fully opened (and which may have stopped in its ascent due to such electrical trouble). Is there anything so alarming in this holding that calls for correction by this court? We respectfully submit that this is good, sound, sensible law which should not be disturbed.

ARGUMENT

POINT I

The decision of the Court of Appeals is not in con-

Excursion Lines, Inc. and the American Waterways Operators, Inc. both assert that there is uncertainty and conflict in the decisions concerning the exchange of warning signals between a bridge and a vessel. We have demonstrated in our brief in opposition to the petition for certiorari that no such conflict exists. Our opposing parties have not called to this Court's attention one case in which a bridge operator or owner was held liable after giving a vessel the warning signal required by applicable regulations.

At page 5 of its proposed brief as *amicus curiae*, the American Waterways Operators, Inc. refers to *The Eureka*, 80 F. 2d 303 (9th Cir. 1935) and alleges that the decision of the Third Circuit Court in the case at bar is "conflicting" with the decision in *The Eureka*. Also relied upon as a basis for the alleged conflict is the case of *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir. 1960), cert. den. 365 U. S. 879 (1961). These cases will be dealt with below to demonstrate that petitioner and its supporters are grasping at straws and are misstating the principles of law in the respective cases.

In *The Eureka, supra*, a vessel, the Eureka, signaled [illegible], signaled for a bridge to open, giving a signal of one long and two sh[illegible]and two short blasts. The bridge tender signaled to the vessel to proc[illegible]el to proceed *and gave no warning signal.* The Court stated at [illegible]stated at 304, "That no warning signal was given by the bridge ten[illegible]bridge tender after he had signaled the Eureka to proceed is admitte[illegible]is admitted." The accident was caused because the west leaf of the dr[illegible]f of the draw-bridge opened promptly but, "because of some defect[illegible]ome defect in the control mechanism, the east leaf could not be raise[illegible]ot be raised" (at 304). The Court stated at 304, that, "The only qu[illegible]he only question as to the negligence of the bridge tender is as[illegible]ider is as to whether or not it was his duty to give some danger[illegible]langer signal operator knew something was wrong but acted on [illegible] sumption that he could overcome the difficulty in ti[illegible]bridge allow the Eureka to pass safely, hence he gave no d[illegible]the as-signal, although provided with a whistle-operated by[illegible]time to pressed air which could be used for that purpose"[illegible]danger Court held that under the circumstances, a danger [illegible]by com-"could and should have been given instantly" (at[illegible]". The citing *Clement* v. *Metropolitan West Side El. R. Co*[illegible]r signal F. 271 (7 Cir. 1903) and *Munroe* v. *City of Chicago*,[illegible]at 306), 936 (7 Cir. 1912), cert. den., 229 U. S. 609 (1913). The[illegible]*Co.*, 123 two leading cases which are referred to in our Brief[illegible]. 194 F. position. The Court held that "the situation confronti[illegible]hese are bridge operator * * * called for the danger signal,[illegible]f in Op-was given, and this failure was an act of negligen[illegible]nting the 306). The holding in *The Eureka* is entirely consisten[illegible]l. None the holding of the Court of Appeals in the case a[illegible]nce (at Here, of course, a danger signal was given.[illegible]nt with at bar.

In *Circle Line Sightseeing Yachts, Inc.* v. *City of York*, 283 F. 2d 811 (1960), the court held the *City o*[illegible]*of New York* liable for failing "to devise an effective mea[illegible]*of New* warning approaching ships of the prospective openi[illegible]eans of [illegible]ning of

the bridge" (283 F. 2d at 813). In this case, the sightseeing vessel was so low-built as to be capable of passing under the bridge *while it was closed*, but the bridge contained low-hanging projections which could collide with the boat if the bridge were to open while the boat was attempting to pass under it. The court held the city liable, saying that, "Thus, instead of developing an adequate signal system to warn approaching boats, the City depended upon the bridge operator to watch for such boats and to delay opening the bridge if they were too close" (at 813). The court held that the operator's failure to make any effort to protect the sightseeing vessel was the proximate cause of the collision. The court added that "The failure to provide an adequate signal system was similarly negligence and a proximate cause of the collision."

That case is distinguished from the case at bar by its unusual circumstances, namely, that the bridge was *required* to give a *warning signal* to the sightseeing vessel only when the bridge *was to be opened*. Moreover, it was the *failure to give the vessel a warning signal* which was the proximate cause of the collision of the sightseeing boat with the bridge. Lastly, holding the bridge owner liable for failing to provide an adequate warning signal system is entirely irrelevant to the case at bar. Here, the owner of the bridge, the State Highway Department, is not a party defendant. As to the negligence of the bridge operator, in the *Circle Line Sightseeing* case, the court held, at 814, that the bridge operator had no right to fail to observe the course of the vessel and, in fact, should not have commenced opening the bridge when he saw the course the vessel was taking. (It was the *opening* of the bridge which caused the accident.) This circumstance is entirely irrelevant to the case at bar.

The court in *Circle* commented upon the Army regulations requiring an exchange of whistle signals between the

boat and the bridge. The court held that the Army regulations did not require a warning system under the circumstances, apparently meaning that the regulations did not require the bridge to give a *warning* that the bridge *was being opened*. (The Army regulations controlling the case at bar requires a warning signal in case of delay or inability to open the bridge.) The court in *Circle Line Sightseeing* refers to a Ninth Circuit case requiring an additional signal light to warn of danger, "in cases where the regular light went dead" (at 814). Again, this is quite different from the case at bar. Here adequate warning signals existed on the bridge and were used by the bridge tender, Peschken.

The court in *Circle Line Sightseeing* also discussed the alleged violation of the Narrow Channel rule by the sightseeing vessel. This rule requires a vessel to keep to the starboard side "when it is safe and practicable". The court then held, at 814, "While custom alone does not justify departure from the important Narrow Channel Rule, these *peculiar and quite temporary circumstances* support a finding that adherence to the rule here was not 'safe and practicable.'" (Emphasis added.) Thus did the Second Circuit reaffirm the importance of strictly complying with navigation rules, noting that the applicable rule itself contained an exception in cases where keeping to the starboard side is not "safe and practicable".

Applying these concepts to the case at bar, we contend that there was no justification for the Lembulus' failure to heed the two-blast warning signal. If a principle of law is adopted which gives a vessel an option to heed or disregard the warning signal from a bridge, the regulations of the Secretary of the Army would be voided and the entire warning system destroyed. There would be no warning signal available. Bridge tenders would become absolute guarantors of a vessel's safety even when the vessel proceeds against a warning signal.

POINT II

There is no showing that petitioner, the Shell Petroleum Co. Ltd., has inadequately presented its petition to this Court.

The motions and proposed briefs of Excursion Lines, Inc. and American Waterways Operators, Inc. add nothing new to the petition submitted by Shell Petroleum Co. Ltd., except that the case of *The Eureka, supra*, is, inappropriately, cited in the proposed *amicus curiae* brief of the American Waterways Operators, Inc. In fact, the respective motions show considerable unfamiliarity with the details of the case at bar. This is to be expected. The moving parties did not participate in the trial. Petitioner's appendix contains only two of the numerous exhibits introduced at the trial and contains twenty pages of excerpts from testimony in a case where the testimony of all witnesses printed by respondent below before the Circuit Court of Appeals ran over two hundred and twenty pages in length.

The Shell Petroleum Co. Ltd. is in a position to present its case without the aid of outsiders. Robert M. Julian, Esq., of 80 Broad Street, New York, New York, who here appears as counsel for the petitioner, participated in the trial as co-proctor for libellant along with the New Jersey firm of McCarter & English, Esqs. Mr. Julian is associated with the firm of Haight, Gardner, Poor & Havens, Esq., of 80 Broad Street, New York City, as appears in Appendix I of the petition, P87a. In fact, Shell's legal representatives were called in on the accident shortly after its occurrence. The letter of Captain Hawkins purportedly written on September 21, 1957, one day after the accident, reproduced in Appendix I of the petition, shows that a copy was sent to Mr. Julian as representative from Messrs. Haight, Gardner, Poor & Havens (P84a, P87a). This shows that Mr. Julian was in on the case right from the start. Captain

Hawkins testified (R12a) that legal representatives of the ship's owner came down while the ship was in the Bethlehem Steel Yard "and took statements from various members of the crew."

Rather than assist the Court in determining whether certiorari should be granted, the moving parties are simply confusing the issues. They are seeking to try the case on one theory in the United States Supreme Court when it was tried on an entirely different theory in the District Court. They are seeking to assert that a two-blast warning signal was not the proper warning signal at the time of the accident when counsel for Shell stipulated at the trial that it was the required warning signal under applicable regulations. Without a basis in the record, they are making allegations of various practices in different parts of the country when counsel for Shell during the trial objected to testimony as to the "usual" signal given by the bridge operator on other occasions. This objection was upheld by the trial court on the theory that the case concerned only the specific signals that were exchanged at the time of the specific accident here involved.

CONCLUSION

We respectfully submit, therefore, that there is no conflict in the case law which justifies an appeal to the United States Supreme Court. Nor is there any showing that counsel for The Shell Petroleum Co. Ltd. is not capable of adequately presenting its petition for certiorari without assistance from the parties seeking to file briefs as *amicus curiae*. We respectfully submit that the motions for leave to file such briefs should be denied.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of
New Jersey,
Counsel for Respondent,
Charles Peschken.

THEODORE I. BOTTER,
Assistant Attorney General,
Of Counsel.